A

Pardeep Kumar a/l Om Parkash Sharma v Abdullah Sani bin Hashim

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEALS NOS W-02–270 OF 2000 AND W-02–279 OF 2000
GOPAL SRI RAM, SURIYADI AND JAMES FOONG JJCA
20 NOVEMBER 2008

C

Civil Procedure — Pleading — Facts not pleaded — Binding effect — Charge of conspiracy not pleaded — Trial judge ruled appellants conspired to defame — Whether applied wrong principle of law — Whether serious misdirection

D

Evidence — Burden of proof — Defamation — Ingredients — Burden of establishing — Gesture of pointing towards respondent and directing to be arrested — Whether slanderous — Whether defamation established on balance of probability — Whether losses established

E

Tort — Defamation — Slander — Ingredients — Allegation of attempted kidnapping — Police report — Whether slanderous — Whether actionable per se — Whether gesture could had effect of conveying defamatory imputation — Whether fabricated story — Whether damages awarded of higher scale

F

There were two appeals before the court which were heard together. They arose from a single case where the appellants were husband and wife. The G cause of action in this case was one of slander. It was alleged that both the appellants had uttered slanderous words against the respondent. In respect of the husband, the precise charge was that he had, on 5 January 1998, told PW2, the school senior assistant, that someone was attempting to kidnap his son. In respect of the wife, the substance of the case was that she told PW3, H a policeman, that the respondent was the elder brother of one of four men who attempted to kidnap her son. The alleged matter took place when the respondent and the appellants were in the school compound accompanying their respective children to the first day of school, the appellants encountered a court process server attempting to serve on the appellant wife a writ of I summons. The appellant wife refused to accept it. Fearing the safety of her child, the appellant wife had called a friend in the police force alleging that her child would be kidnapped. A police patrol car arrived to investigate. PW3 then spoke to the appellant wife who directed his attention to the respondent. At that time the appellant husband was by the side of his wife. According to

the pleaded case of the respondent, the appellant wife had said to PW3 the following slanderous words: *Lelaki itu dan adiknya Dato' Abdullah Hishan bin Mohd Hashim cuba menculik anak saya* ('that man and his younger brother, Dato' Abdullah Hishan bin Mohd Hashim tried to kidnap my son). PW3 then approached the respondent and requested for his identification card. The respondent enquired as to the reason for this request and according to PW3: *Perempuan itu telah membuat aduan bahawa adik encik Dato' Abdullah Hishan bin Mohd Hashim dan encik disyaki cuba menculik anaknya* ('that lady has complained that your brother and you are suspected of attempting to kidnap her son'). According to the respondent, the words uttered by the appellant wife imputed, inter alia, that he had conspired with his brother to commit a criminal offence and this had disparaged him. At the close of the respondent's case the appellants elected not to call evidence and to rest on their submissions. The learned judge found for the respondent against both appellants not only in the tort of defamation but also in the tort of conspiracy. Damages in the sum of RM800,000 were awarded as against the husband and RM1m awarded against the wife. On appeal to this court, the most forceful argument by the appellant wife's counsel was that the finding of the High Court was not based on the pleaded case of the respondent.

Held, allowing both appeals with costs:

(1) (per **Gopal Sri Ram JCA**) In an action for defamation, two questions were involved on the issue of identification. The first is one of law, that is whether the defamatory words can be regarded as being capable of referring to the respondent. The second is a question of fact namely, whether reasonable persons who knew the respondent would conclude that the defamatory words refer to him or her. If the first question was resolved in the appellant's favour, then the second did not arise. In the present instance, the pleaded words were not capable, as a matter of law, of being regarded as making any reference to the respondent. The second question — the factual question — therefore does not arise. It follows that a vital ingredient of the tort was absent. The judge should therefore have ruled in the husband's favour on his submission of no case (see paras 2–3).

(2) (per **Gopal Sri Ram JCA**) The words attributed to the wife and pleaded in the statement of claim were that the respondent and his younger brother attempted to kidnap the son of the appellant wife. However, the words proven through the evidence of PW3 were wholly different. According to PW3, the appellant wife told him that the respondent was the elder brother to one of the four men who attempted to kidnap her son. Unfortunately, the judge in the court below appeared to have

completely disregarded the respondent's pleaded case and proceeded to find for him on the proved case. This was a serious misdirection (see para 4).

(3) (per **Gopal Sri Ram JCA**) The judge, by his decision, gave effect to an entirely new case which the respondent had not made out in his own pleadings. As it happened, the respondent's pleaded case did not raise any charge of conspiracy. The judge therefore found for the respondent on an unpleaded case. This was plainly wrong and as a pure matter of procedural law it was manifestly unjust (see para 6).

(4) (per **James Foong JCA**) Testimony of PW3 was materially different. PW3 said that the appellant wife told him that the respondent was the elder brother of one of the four Malay men who attempted to kidnap her son and directed him to arrest that man. This was not the same or substantially the same from that pleaded by the respondent. This difference was not just a minor variance. It gives a completely different meaning. One statement implies that Dato' Abdullah Hishan and the respondent were in cahoots to kidnap the appellant's son whilst the other indicates that the respondent's brother Dato' Abdullah Hishan was one of the four men who attempted to commit the criminal act of kidnap. To put it plainly, the latter was where the respondent's brother together with three others without the inclusion of the respondent were the sole culprits while the former has the respondent included in the criminal act. So when the words uttered are materially different from those pleaded a claim for defamation could not be sustained (see para 14).

(5) (per **James Foong JCA**) Further, the respondent had not pleaded that there was a gesture by the appellant wife to PW3 with accompanying instruction to arrest the respondent. When gesture could have the effect of conveying a defamatory imputation, it must be expressly pleaded. Despite the absence of this, the High Court relied heavily on it to come to a conclusion that the respondent had proved his case against the appellants (see para 15).

(6) (per **James Foong JCA**) The reasons of the High Court against the appellant husband were pathetic in the sense that they did not support a cause of action for slander against the respondent. First, the utterances by the appellant husband to the teacher made no reference of the respondent. Second, even if the appellant husband had told the police team from the patrol car that there was an attempt to kidnap his child, no reference was ever made of the respondent being involved in it. Third, when the appellant wife spoke to PW3, the appellant husband said nothing. Fourth, this appellant not only kept quiet, he made no

gesture of any kind implicating the respondent. Under these circumstances there could be no slander by the appellant husband of the respondent? (see para 19). A

(7) (per **James Foong** JCA) The High Court was not only bias against the appellants but was also obsessed in wanting to return a verdict against the appellants at all cost without due consideration to the law. This view was fortified by the High Court's ruling that both the appellants had conspired to defame the respondent when this was not even pleaded in the statement of claim (see para 19). B

(8) (per **Suriyadi** JCA, dissenting in part) A perusal of the words as repeated by PW3 to the respondent, though not verbatim as pleaded in the statement of claim, showed that they had a tendency to excite ordinary listeners that the respondent was out to kidnap the first appellant's child. PW3, as a third party, was certainly convinced of the first plaintiff's allegations, gestures and conduct. If a hardened policeman was successfully influenced, how could the many ordinary parents loitering around the school premises or onlookers not be? With the dramatic allegation made by the first appellant of a kidnapping attempt of her child, what with a police car with its beacon switched on parked in the school compound, even the headmaster had feared the worst and subsequently lodged a police report (see para 30). C D E

(9) (per **Suriyadi JCA**, dissenting in part) The slanderous remarks which were made by the first appellant, and repeated to the respondent by PW3 conspicuously had referred to the respondent. This satisfied the legal requirement that the slanderous remarks were made to a third party. The conduct of the first appellant pointing towards the direction of the respondent and directing him to arrest the respondent merely strengthened the respondent's case. There was no hesitation as to PW3's target of enquiry when he zeroed in on the respondent, to be followed by the request of his identification card. He also repeated to the respondent of the slanderous remark made of him when the latter demanded to know the reason for the request (see paras 31–33). F G

(10) (per **Suriyadi JCA**, concurring in part) During the trial not an iota of evidence was adduced by the respondent to establish that the second appellant had said in so many words or even the slightest of gesture, that the respondent was out to kidnap his child. Silence on his part, at the material time when the first appellant made the slanderous remarks, which could be interpreted in any manner, in the circumstances of the case failed to satisfy an important legal prerequisite. His silence, by no stretch of the imagination could be equated with words that qualify as slanderous, or the first appellant's words could be attributed to him. The only time the second appellant spoke out of the kidnapping attempt was when he said to the senior assistant that someone was out H I

to kidnap his child. Yet this remark never referred to the respondent by name. With that failure to establish such an important ingredient, and thus failing to transmit anything slanderous to a third party affecting the respondent, even the election of no case to answer by the second appellant failed to salvage the respondent's case against him (see para 37).

(11) (per **Suriyadi JCA**, concurring in part) The legal principles alluded to by the learned judge when awarding the damages and compensation was correct except that it was on the higher side of the scale. A global sum of RM200,000 for damages, included in it general damages and aggravated damages, a sum in sync with current awards trend, is ordered. Before arriving at this sum the court had taken into account the sufferings of the respondent and the want of apology tendered or remorse shown by the first appellant (see para 39).

[Bahasa Malaysia summary

Terdapat dua rayuan di hadapan mahkamah yang didengar bersama. Ia timbul daripada satu kes yang mana perayu-perayu adalah suami dan isteri. Kausa tindakan di dalam kes ini adalah slander. Adalah didakwa bahawa kedua-dua perayu telah melafazkan perkataan bersifat slander terhadap responden. Berkenaan dengan si suami, dakwaan yang sebenar adalah bahawa dia pada 5 Januari 1998, telah memberitahu PW2, penolong kanan sekolah, yang seseorang cuba untuk menculik anak lelakinya. Berkenaan dengan si isteri, isi kandungan kes adalah bahawa dia memberitahu PW3, seorang anggota polis, bahawa responden adalah abang kepada salah seorang daripada empat lelaki yang cuba untuk menculik anaknya. Perkara yang didakwa berlaku, semasa responden dan perayu-perayu berada di kawasan sekolah mengiringi anak masing-masing dihari pertama persekolahan, dan perayu-perayu didatangi oleh penghantar saman mahkamah yang cuba untuk menyampaikan kepada perayu isteri writ saman. Perayu isteri enggan menerimanya. Takut akan keselamatan anaknya, perayu isteri telah menghubungi seorang kawan di dalam pasukan polis mendakwa bahawa anaknya mungkin akan diculik. Sebuah kereta peronda polis telah tiba untuk menyiasat. PW3 kemudiannya bercakap dengan perayu isteri yang mengarahkan perhatiannya kepada responden. Ketika itu perayu suami berada di sisi isterinya. Menurut kes yang diplidkan oleh responden, perayu isteri telah berkata kepada PW3 perkataan bersifat slander seperti berikut: *Lelaki itu dan adiknya Dato' Abdullah Hishan bin Mohd Hashim cuba menculik anak saya.* PW3 kemudiannya mendekati responden dan meminta kad pengenalannya. Responden bertanyakan berkenaan dengan sebab permintaan tersebut dan menurut PW3: *Perempuan itu telah membuat aduan bahawa adik encik Dato' Abdullah Hishan bin Mohd Hashim dan encik disyaki cuba menculik anaknya*. Menurut responden, perkataan yang dilafazkan oleh

perayu isteri menunjukkan, antara lain, bahawa dia berkonspirasi dengan adiknya untuk melakukan kesalahan jenayah dan ini telah memperkecilkannya. Semasa penutupan kes responden, perayu-perayu memilih untuk tidak memberikan keterangan dan bersandar kepada hujahan mereka. Hakim yang bijaksana memutuskan bagi pihak responden terhadap kedua-dua perayu bukan sahaja di dalam tort fitnah tetapi juga di dalam tort konspirasi. Ganti rugi sejumlah RM800,000 telah diawardkan terhadap si suami dan RM1j diawardkan terhadap isterinya. Semasa rayuan di mahkamah ini, pernyataan yang paling tegas peguamcara perayu isteri adalah bahawa keputusan Mahkamah Tinggi tidak berdasarkan kes yang diplidkan oleh responden.

Diputuskan, membenarkan kedua-dua rayuan dengan kos:

(1) (oleh **Gopal Sri Ram HMR**) Dalam satu tindakan untuk fitnah, dua persoalan terlibat berkenaan dengan isu pengenalan. Pertama berkaitan dengan undang-undang, iaitu sama ada perkataan fitnah boleh dikatakan sebagai boleh merujuk kepada responden. Kedua adalah persoalan fakta iaitu, sama ada seseorang yang munasabah yang mengenali responden boleh menyimpulkan bahawa perkataan fitnah merujuk kepadanya. Jika persoalan pertama diputuskan berpihak kepada perayu, maka persoalan kedua tidak timbul. Di dalam kes ini, perkataan yang diplidkan tidak mampu, dari segi undang-undang, dianggap sebagai membuat apa-apa rujukan kepada responden. Persoalan kedua — persoalan fakta — oleh itu tidak timbul. Berikutan itu unsur utama bagi tort tidak wujud. Oleh itu hakim sepatutnya membuat keputusan berpihak kepada suami atas hujahan tiada kes (lihat perenggan 2–3).

(2) (oleh **Gopal Sri Ram HMR**) Perkataan yang ditujukan kepada isteri dan telah diplidkan di dalam pernyataan tuntutan adalah bahawa responden dan adiknya cuba untuk menculik anak lelaki perayu isteri. Walau bagaimanapun, perkataan yang dibuktikan melalui keterangan PW3 keseluruhannya berbeza. Menurut PW3, perayu isteri telah memberitahunya bahawa responden adalah abang kepada salah seorang daripada empat lelaki yang cuba untuk menculik anaknya. Walau bagaimanapun, hakim di mahkamah bawahan kelihatan mengabaikan keseluruhan kes yang telah diplidkan oleh responden dan meneruskan dapatannya atas kes yang telah dibuktikan. Ini adalah salah arah yang serius (lihat perenggan 4).

(3) (oleh **Gopal Sri Ram HMR**) Hakim, melalui keputusannya, memberikan kesan kepada kes yang keseluruhannya baru yang responden tidak pohon di dalam plidingnya sendiri. Seperti yang berlaku, kes yang diplidkan oleh responden tidak membangkitkan

apa-apa dakwaan konspirasi. Oleh itu hakim membuat penemuan memihak kepada responden berasaskan kes yang tidak diplidkan. Kes ini adalah jelas bersalahan dan sebagai undang-undang prosedur yang jelas ianya adalah nyata tidak adil (lihat perenggan 6).

(4) (oleh **James Foong HMR**) Keterangan PW3 adalah berbeza secara material. PW3 menyatakan bahawa perayu isteri telah memberitahunya bahawa responden adalah abang kepada salah seorang daripada empat lelaki Melayu yang cuba untuk menculik anak lelakinya dan mengarahkannya untuk menangkap lelaki tersebut. Ini tidak sama atau jauh berbeza daripada yang diplidkan oleh responden. Perbezaan ini bukanlah satu kelainan yang kecil. Ianya memberikan maksud yang berbeza secara keseluruhannya. Satu kenyataan menunjukkan Dato' Abdullah Hishan dan responden adalah bersekongkol untuk menculik anak lelaki perayu manakala satu lagi menunjukkan bahawa adik responden, Dato' Abdullah Hishan, adalah salah seorang daripada empat lelaki yang cuba untuk melakukan perlakuan jenayah penculikan. Dalam kata lain, pernyataan kedua adalah bahawa adik responden bersama-sama dengan tiga yang lain, tidak termasuk responden adalah punca utama sementara dalam pernyataan yang pertama responden dilibatkan di dalam perlakuan jenayah tersebut. Oleh itu apabila perkataan yang dilafazkan adalah begitu berbeza daripada apa yang diplidkan pernyataan tuntutan bagi fitnah tidak boleh dipertahankan (lihat perenggan 14).

(5) (oleh **James Foong HMR**) Selanjutnya responden tidak memplidkan bahawa terdapat gerak isyarat oleh perayu isteri kepada PW3 dengan disertakan arahan untuk menangkap responden. Apabila gerak isyarat memberikan kesan yang membawa tuduhan fitnah, ianya mestilah diplidkan dengan jelas. Walaupun tanpa perkara ini, Mahkamah Tinggi begitu bergantung terhadapnya untuk membuat kesimpulan bahawa responden telah membuktikan kesnya terhadap perayu-perayu (lihat perenggan 15).

(6) (oleh **James Foong HMR**) Alasan bagi Mahkamah Tinggi terhadap perayu suami adalah menyedihkan di mana ia tidak menyokong kausa tindakan bagi slander terhadap responden. Pertama, lafaz oleh perayu suami kepada guru tidak merujuk kepada responden. Kedua, walaupun perayu suami telah memberitahu pasukan polis di dalam kereta peronda bahawa terdapat cubaan untuk menculik anaknya tiada langsung rujukan dibuat bahawa responden terlibat. Ketiga, apabila perayu isteri bercakap dengan PW3, perayu suami tidak berkata apa-apa. Keempat, perayu bukan sahaja berdiam diri, dia tidak melakukan apa jua gerak isyarat yang membabitkan responden. Di bawah keadaan ini, tidak boleh terdapat slander oleh perayu suami terhadap responden (lihat perenggan 19).

(7) (oleh **James Foong HMR**) Mahkamah Tinggi bukan saja berat sebelah terhadap perayu-perayu tetapi juga terlalu ingin memberikan keputusan terhadap perayu-perayu dengan apa cara sekali pun tanpa mempertimbangkan undang-undang. Pandangan ini telah dikuatkan oleh keputusan Mahkamah Tinggi bahawa kedua-dua perayu telah berkonspirasi untuk memfitnah responden walaupun ia tidak diplidkan di dalam pernyataan tuntutan (lihat perenggan 19).

(8) (oleh **Suriyadi HMR**, menentang sebahagian) Meneiliti perkataan-perkataan tersebut seperti yang yang diulang oleh PW3 kepada responden, walaupun tidak secara verbatim seperti yang telah diplidkan di dalam pernyataan tuntutan, menunjukkan bahawa ia mempunyai kecenderungan untuk merangsang pendengar biasa bahawa responden berniat untuk menculik anak perayu pertama. PW3, pihak ketiga, pasti yakin dengan dakwaan, gerak isyarat dan perlakukan plaintif pertama. Jika seorang polis yang teguh berjaya dipengaruhi, mengapa tidak ibu bapa yang berada di sekitar kawasan sekolah. Dengan dakwaan yang dramatik dibuat oleh perayu pertama berkenaan dengan cubaan menculik anaknya, dan dengan kereta polis dengan isyaratnya dihidupkan di kawasan sekolah, menjadikan guru besar pun risau terjadi sesuatu yang buruk menyebabkannya membuat laporan polis (lihat perenggan 30).

(9) (oleh **Suriyadi HMR**, menentang sebahagian) Kata-kata bersifat slander yang dibuat oleh perayu pertama dan diulangi kepada responden oleh PW3 jelas menunjukkan ia merujuk kepada responden. Ini memenuhi keperluan undang-undang bahawa kata-kata bersifat slander dibuat kepada pihak ketiga. Perlakuan perayu pertama mengarah kepada responden dan menyuruhnya menangkap responden hanya menguatkan kes responden. Tidak terdapat keraguan berkenaan dengan sasaran siasatan PW3 apabila dia terus menghampiri responden diikuti dengan permintaan untuk kad pengenalannya. Dia juga mengulangi kepada responden kata-kata bersifat slander yang dibuat kepadanya apabila responden mendesak untuk mengetahui sebab permintaan tersebut (lihat perenggan 31–33).

(10) (oleh **Suriyadi HMR**, bersetuju sebahagian) Semasa perbicaraan tidak sedikit pun keterangan dikemukakan oleh responden untuk membuktikan bahawa perayu kedua telah katakan dalam banyak perkataan atau walaupun sedikit gerak isyarat bahawa responden berniat untuk menculik anaknya. Pembisuan pada pihaknya, pada masa yang material apabila perayu pertama membuat kata-kata bersifat slander tersebut, yang boleh ditafsirkan dalam apa-apa cara pun, dalam keadaan kes gagal untuk memenuhi keperluan perundangan yang penting. Pembisuannya, dalam apa keadaan sekalipun tidak boleh disamakan dengan perkataan yang boleh bermaksud slander, atau

perkataan perayu pertama boleh ditujukan kepadanya. Satu-satunya masa perayu kedua bercakap mengenai dengan cubaan menculik adalah apabila dia berkata kepada penolong kanan bahawa terdapat seseorang cuba menculik anaknya. Tetapi kata-kata ini tidak merujuk kepada responden dengan nama. Dengan kegagalan untuk membuktikan keperluan penting tersebut, dan kegagalan untuk menyatakan apa-apa yang bersifat slander kepada pihak ketiga yang memberikan kesan kepada responden, walau pemilihan tiada kes untuk dijawab oleh perayu kedua telah gagal untuk menyelamatkan kes responden terhadapnya (lihat perenggan 37).

(11) (oleh **Suriyadi HMR**, bersetuju sebahagian) Prinsip undang-undang yang disentuh oleh hakim yang bijaksana apabila mengawardkan ganti rugi dan pampasan adalah betul kecuali adalah tinggi kadarnya. Jumlah keseluruhan RM200,000 untuk ganti rugi, termasuk di dalamnya ganti rugi am dan ganti rugi teruk, satu jumlah yang selaras dengan trend terkini adalah diperintahkan. Sebelum memutuskan jumlah ini mahkamah mengambil pertimbangan kesusahan yang ditanggung responden dan permohonan kemaafan yang dikemukakan atau kekesalan yang ditunjukkan oleh perayu pertama (lihat perenggan 39).]

Notes

For a case on defamation, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) para 416.

For cases on facts not pleaded, see 2(3) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 5401–5407.

Cases referred to

C Sivanathan v Abdullah bin Dato Haji Abdul Rahman [1984] 1 MLJ 62, HC (refd)

Gutsole v Mathers [1836] 1 M & W 495 (refd)

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693; [1997] 4 CLJ 509, SC (refd)

Janagi v Ong Boon Kiat [1971] 2 MLJ 196, HC (refd)

Knupffer v London Express Newspaper Ltd [1944] AC 116, HL (refd)

Luk Kai Lam v Sim Ai Leng [1978] 1 MLJ 214, FC (refd)

Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor [2008] 3 MLJ 81; [2008] 2 CLJ 369, CA (refd)

Simirah v Chua Hock Lee & Anor [1963] MLJ 239; [1963] 1 LNS 128, CA (refd)

Storey v Storey [1961] P 63, CA (refd)

Legislation referred to

Rules of the High Court 1980 O 78 r 3

Appeal from: Civil Suit No S2(S5)–23–08 of 1998 (Kuala Lumpur, High Court)

Lambert Rasa-Ratnam (Sean Yeow with him) (Lee Hishamuddin Allen & Gledhill) for the appellant.

Karpal Singh (Sangeet Kaur Deo with him) (Karpal Singh & Co) for the respondents.

Gopal Sri Ram JCA:

[1] There are two appeals before us. They are by the defendants in the court below. The defendants are husband and wife. They were sued by the plaintiff (respondent before us) in the tort of defamation. In respect of the husband, the precise charge is that on 5 January 1998 he told PW2 (the school senior assistant) that someone is attempting to kidnap his (the husband's) son. In respect of the wife, the substance of the case is that she told PW3 (a policeman) that the plaintiff is the elder brother of one of four men who attempted to kidnap her son. At the close of the plaintiff's case the defendants elected not to call evidence and to rest on their submissions. The learned judge found for the plaintiff against both defendants not only in the tort of defamation but in the tort of conspiracy as well. Damages in the sum of RM800,000 were awarded as against the husband. These were made up of RM300,000 as general damages, RM300,000 as aggravated damages and RM200,000 as exemplary damages. A further RM1m was awarded as against the wife, made up of RM300,000 as general damages, RM300,000 as aggravated damages and RM400,000 as exemplary damages.

[2] Before us it was argued for the husband that the alleged slanderous words pleaded by the plaintiff in his statement of claim and relied on by him as constituting a cause of action in defamation do not contain any reference to the plaintiff. In short, an essential ingredient of the tort was absent from the plaintiff's own pleaded case. In my judgment there is merit in this argument. The leading case upon the subject is *Knupffer v London Express Newspaper Ltd* [1944] AC 116 where (at p 121) it was held by the House of Lords that in an action for defamation two questions were involved on the issue of identification. The first question is one of law. It is whether the defamatory words can be regarded as being capable of referring to the plaintiff. The second is a question of fact. It is whether reasonable persons who know the plaintiff would conclude that the defamatory words refer to him or her. If the first question is resolved in the defendant's favour, then the second does not arise.

[3] In the present instance the pleaded words — and the plaintiff is bound by his pleaded case — are not capable, as a matter of law, of being regarded

as making any reference to the plaintiff. The second question — the factual question — therefore does not arise. It follows that a vital ingredient of the tort is absent. The judge should therefore have ruled in the husband's favour on his submission of no case. On this rather short and simple ground I would allow the husband's appeal.

[4] I now turn to the wife's case. The complaint here is that the pleaded words were not proved. The words attributed to the wife and pleaded in the statement of claim are that the plaintiff and his younger brother attempted to kidnap the son of the defendant wife. However, the words proved through the evidence of PW3 were wholly different. According to PW3, the defendant wife told him that the plaintiff is the elder brother to one of four men who attempted to kidnap her son. Unfortunately, the judge in the court below appears to have completely disregarded the plaintiff's pleaded case and proceeded to find for him on the proved case. This, in my respectful view, is a serious misdirection.

[5] In *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196, the learned magistrate dismissed plaintiff's claim on a promissory note on a ground that was not raised in the defence. On revision, Sharma J said:

> A statement of claim and the defence (together with the reply, if any) constitute the pleadings in a civil action. It is on the examination of the pleadings that the court notices the differences which exist between the contentions of the parties to the action. In other words the matters on which the parties are at issue are determinable by an examination of the pleadings. An issue arises when a material proposition of law or fact is affirmed by one party and denied by the other. The court is not entitled to decide a suit on a matter on which no issue has been raised by the parties. It is not the duty of the court to make out a case for one of the parties when the party concerned does not raise or wish to raise the point. In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its own pleadings. The trial of a suit should be confined to the pleas on which the parties are at variance. If the parties agree to a factual position then it is hardly open to the court to come to a finding different from such agreed facts. The only purpose in requiring pleadings and issues is to ascertain the real difference between the parties and to narrow the area of conflict and to see just where the two sides differ.

[6] So too here. The judge, by his decision, gave effect to an entirely new case which the plaintiff had not made out in his own pleadings. As such his findings against the defendant wife cannot stand. I think it convenient at this stage to mention the finding of conspiracy made by the judge against the defendants. As it happens, the plaintiff's pleaded case did not raise any charge

of conspiracy. The judge therefore found for the plaintiff on an unpleaded case. This is plainly wrong and as a pure matter of procedural law it is manifestly unjust.

[7] In the course of preparing this judgment I have had the opportunity of reading the judgment of my learned brother Suriyadi. For the reasons I have already given it is entirely my misfortune that I find myself unable to agree with all his views on these appeals. Based on what I have said thus far, I find it unnecessary to deal with the issue of damages as the plaintiff has failed to prove his case against both the defendants. Accordingly, I would allow this appeal with costs here and in the court below. The deposit in each appeal shall be refunded to each respective appellant.

James Foong JCA:

INTRODUCTION

[8] There are two appeals before us which were heard together. They arose from a single case where the appellants were husband and wife. When judgment was given against them they filed separate appeals: the husband in Appeal No W-02–270 of 2000, and the wife in W-02–279 of 2000. For easy identification of the parties, I shall refer to them in this appeal as appellant husband and appellant wife. Since the respondent is the same person in both appeals, I shall continue to address him in this capacity in this judgment.

[9] The cause of action in this case is one of slander. It is alleged that both the appellant husband and the appellant wife had uttered slanderous words against the respondent. It all happened in this way.

[10] One day when the respondent and the appellants were in the school compound accompanying their respective children to the first day of school, the appellants encountered a court process server attempting to serve on the appellant wife a writ of summons. The appellant wife refused to accept it. She must have called a friend in the police force out of fear that her child would be kidnapped. A police patrol car arrived to investigate. A police officer therefrom, Lance Corporal Zambri ('PW3'), then spoke to the appellant wife who directed his attention to the respondent. At that time the appellant husband was by the side of his wife. According to the pleaded case of the respondent, the appellant wife had said to PW3 these slanderous words *Lelaki itu dan adiknya Dato' Abdullah Hishan bin Mohd Hashim cuba menculik anak saya* (English translation: That man and his younger brother, Dato' Abdullah Hishan bin Mohd Hashim tried to kidnapped my son). PW3 then approached the respondent and requested for his identification card. The respondent enquired as to the reason for this request and according to the

respondent, PW3 said to him *Perempuan itu telah membuat aduan bahawa adik encik Dato' Abdullah Hishan bin Mohd Hashim dan encik disyaki cuba menculik anaknya* (in English: That lady has complained that your brother and you are suspected of attempting to kidnap her son.)

[11] According to the respondent, the words uttered by the appellant wife impute, inter alia, that he conspired with his brother to commit a criminal offence and this has disparaged him.

IN THE HIGH COURT

[12] When PW3 gave evidence in the High Court, he testified as follows regarding what was said to him by the appellant wife:

> Yang menyatakan 4 orang lelaki akan menculik anaknya ialah perempuan.
>
> Pada masa yang sama perempuan India tersebut menunjukkan ke arah satu lelaki Melayu dengan menyatakan itu adalah abang kepada salah seorang 4 lelaki yang cuba menculik anak beliau dan mengarahkan saya menangkap lelaki tersebut.
>
> (In English: That there were 4 Malay men who wish to kidnap her son was the lady. At that time the said Indian lady (in reference to the appellant wife) directed to one Malay man and said that he is the elder brother of one of the 4 Malay men who attempted to kidnap her son and directed me to arrest that man.)

FINDING OF HIGH COURT

[13] The High Court found the respondent's claim proven after the appellants submitted no case to answer and called no evidence for the defence. Against the appellant wife, the High Court gave these reasons:

> The Words Used and Accompanying Conduct of the Defendants Defamatory of the Plaintiff?
>
> The impugned words uttered by the first defendant were:
>
> > 'Ada 4 lelaki Melayu cuba menculik anak saya. Lelaki itu adalah abang kepada salah seorang lelaki yang cuba culik anak saya. Tangkap lelaki tersebut.
>
> Having uttered these words the first defendant pointed towards the direction of the plaintiff and ordered PW3 to arrest the plaintiff. Conduct of the first defendant was one of certainty. She wanted PW3 to believe that the plaintiff was involved in the attempted kidnapping; otherwise there was no need for her to direct PW3 to arrest the plaintiff. After all, if it was only the plaintiff's brother who was one of the four male Malays involved in the alleged attempted kidnapping, the plaintiff had nothing to do with it. Yet, by directing the Lance Corporal's mind to do a positive act of wanting the plaintiff arrested the conduct and attitude of the first defendant gave PW3 no doubt that the plaintiff was a suspect relating to the attempted kidnapping.

CASE OF THE APPELLANT WIFE

[14] The most forceful argument by the appellant wife's counsel before us is that this finding of the High Court is not based on the pleaded case of the respondent. The slanderous words as pleaded by the respondent were these: 'That man and his younger brother, Dato' Abdullah Hishan bin Mohd Hashim tried to kidnap my son'. So what was required of the respondent was for him to render evidence to prove that these words or substantially these words were actually uttered. Instead, what we have from the testimony of PW3 is materially different. PW3 said that the appellant wife told him that the respondent is the elder brother of one of the four Malay men who attempted to kidnap her son and directed him to arrest that man. This is not the same or substantially the same from that pleaded by the respondent. This difference is not just a minor variance. It gives a completely different meaning. One statement implies that Dato' Abdullah Hishan and the respondent were in cahoots to kidnap the appellant's son whilst the other indicates that the respondent's brother Dato' Abdullah Hishan was one of the four men who attempted to commit the criminal act of kidnap. To put it plainly, the latter is where the respondent's brother together with three others without the inclusion of the respondent were the sole culprits while the former has the respondent included in the criminal act. So when the words uttered are materially different from those pleaded a claim for defamation cannot be sustained. The authority of this is *Janagi v Ong Boon Kiat* [1971] 2 MLJ 196 which says:

> In disposing of a suit or matter involving a disputed question of fact it is not proper for the court to displace the case made by a party in its pleadings and give effect to an entirely new case which the party had not made out in its pleadings.

This is particularly pertinent when the impugn words uttered form the very basis of the cause of action.

[15] Further, the respondent has not pleaded that there was a gesture by the appellant wife to PW3 with accompanying instruction to arrest the respondent. When gesture can have the effect of conveying a defamatory imputation, it must be expressly pleaded — see *Gutsole v Mathers* [1836] 1 M & W 495 at p 501. Despite the absence of this, the High Court relied heavily on it to come to a conclusion that the respondent has proved his case against the appellants.

[16] For these reasons, it is my judgment that the respondent has failed to prove his case against the appellant wife.

CASE OF THE APPELLANT HUSBAND

[17] In the respondent's pleadings against the appellant husband, it says

that this appellant had said to a teacher who picked up the writ, which was strewn on the floor when the appellant wife refused to accept it from the process server, that *surat-surat itu tidak ada apa-apa sengaja orang mahu buat kacau* (English translation: these documents are nothing except that there are people who wish to make trouble.) Later, this appellant informed the same teacher that there were people who tried to kidnap his son. And when the police arrived, this appellant just stood next to his wife. From these events, the respondent claimed that teacher would know it was the respondent who wants to kidnap the appellants' son and is therefore liable to the respondent for slander.

[18] The High Court found for the respondent based on these:

> The fact that the second defendant informed PW3 as soon as the latter arrived in the patrol car, and in the presence of many parents, that a kidnap attempt was made on his child, and the fact that he told the same story to PW 2, the senior assistant, and coupled with the fact that he was present with the first defendant when the latter pointed to the plaintiff as the elder brother of one of the four Malays who had attempted to kidnap her child and that the plaintiff ought to be arrested, and coupled with the further fact that he kept silent to all these, thereby implicitly agreeing with what his wife had said, show ample proof that he is a willing party to this slander and has condoned and accepted the said slander upon the plaintiff.

[19] These reasons of the High Court are to my mind pathetic in the sense that they do not support a cause of action for slander against the respondent. First, the utterances by the respondent to the teacher made no reference of the respondent. Second, even if the appellant husband had told the police team from the patrol car that there was an attempt to kidnap his child, no reference was ever made of the respondent being involved in it. Third, when the appellant wife spoke to PW3, this appellant said nothing. Fourth, this appellant not only kept quiet he made no gesture of any kind implicating the respondent. Under these circumstances how can there be slander by the appellant husband of the respondent? I find no law to support a proposition that without any statement or gesture by a defendant of the claimant can land a defendant liable for slander. It is my opinion, having considered the High Court's judgment as a whole, the High Court was not only bias against the appellants but was also obsessed in wanting to return a verdict against the appellants at all cost without due consideration to the law. This view is fortified by the High Court's ruling that both the appellants had conspired to defame the respondent when this was not even pleaded in the statement of claim. For this, I must allow both the appellants' appeals with cost here and below. As a result of this, there is no necessity for me to address in detail the

award of damages handed down by the High Court which to my mind is highly excessive, against all current trend and should be set aside.

CONCLUSION

[20] I have the good fortune of reading the draft judgments of my bothers Justice Gopal Sri Ram and Justice Suriyadi Halim Omar respectively before writing this judgment of mind. I am inclined to the views expressed by Justice Gopal Sri Ram in his judgment and share the same misfortune as him in disagreeing with those expounded by Justice Suriyadi Halim Omar regarding the appellant wife. Accordingly, I would allow both these appeals with costs here and below. The order of the High Court set aside. The deposit in each appeal shall be refunded to the respective appellant.

Suriyadi JCA:

[21] It was pleaded that the plaintiff (hereinafter referred to as the respondent), had been slandered by the defendants (appellants) at the school premises on 5 January 1998, sometime at about 8.20am. There the respondent had seen the arrival of a police car. Two police officers thereafter alighted and the two appellants approached them. The respondent saw the first appellant talking to one of the police officers and she thereafter pointed at his direction. That officer ie Zambri ('PW3') approached him and requested for his identity card. The respondent demanded to know the reason and Zambri said that the first appellant had reported of four men wanting to kidnap their child. He further added that the first appellant had said that he and his brother had tried to kidnap her child. The pleaded words were, *Perempuan itu telah membuat aduan bahawa adik encik Dato' Abdullah Hishan bin Mohd Hashim dan encik disyaki cuba menculik anaknya*. This statement in its natural meaning and normal parlance meant, inter alia, that the respondent was involved in the commission of a crime of kidnapping with his brother, he could be imprisoned, he was a cruel man and a danger to society apart from being immoral. As a result of the conduct of both the appellants Zambri was convinced that the respondent was a suspect in a kidnap attempt. He also added that the first appellant had asked him to arrest the respondent. The respondent was shocked and ashamed of the explanation what with parents of the other school children being around.

[22] From a procedural point of view, the first hurdle of O 78 r 3 of the Rules of the High Court 1980 had been overcome, when the respondent had meticulously particularised the facts and matter on which he relied upon complained of as being slanderous.

[23] I now briefly touch on the law of defamation in relation to slander. There is only one tort of defamation, though in reality the law of defamation consists of two separate civil actions, one being the action in libel and the other slander (*The Law of Defamation in Singapore and Malaysia* by Keith R Evans; *Principles of the Law of Tort in Malaysia* by Wan Azlan Ahmad and Mohsin Hingun). We are only concerned with the latter action in this appeal. Slander consists of spoken words, gestures or inarticulate but significant sounds, with emphasis more on the hearing, and hence not in a more permanent form as compared to libel. In a nutshell it is transient in nature. Slander is actionable on proof of special damage which in layman's term means actual damage that is capable of being estimated in money. Slanderous words, irrespective, will be actionable per se in four instances, with the relevant one for purposes of this case, being if the words impute the commission of a crime for which the plaintiff may be punished corporally as opposed to a mere fine (*C Sivanathan v Abdullah bin Dato Haji Abdul Rahman* [1984] 1 MLJ 62; yet in *Luk Kai Lam v Sim Ai Leng* [1978] 1 MLJ 214 the court saw it fit to hold that consistent slander against a lawyer for non-payment of rental was actionable per se, implying that in certain special circumstances the list may be expanded). Corporal punishment includes imprisonment, whipping and hanging. As the allegation against the respondent was kidnapping his action against the appellants was actionable per se.

[24] To succeed in an action of slander, as in libel, a plaintiff has to prove that the matter complained of, which emanated from the defendant is defamatory, refers to him (an issue of identification) and was transmitted to a third person (publication). The burden of establishing those ingredients at the outset rests on the plaintiff. Thereafter, if the plaintiff has succeeded in establishing the three ingredients, certain presumptions in favour of the latter then follows, namely that the matter complained of is true, and that in actions of slander where it is actionable per se, damage was caused to the plaintiff. The defendant in defence must rebut and establish that the remarks made were true and that the plaintiff has suffered no damage.

[25] Despite the available evidence that:

(i) the first appellant had been identified by Zambri (PW3) as having made the remark of the respondent and his brother wanting to kidnap her child;

(ii) for the benefit of Zambri to identify the respondent the first appellant had pointed at his direction;

(iii) the first appellant had directed him to arrest the respondent;

(iv) Zambri had repeated the above three matters to the respondent;

(v) Zambri had approached the respondent and no one else, and requested his identity card thus establishing beyond doubt that the statements of the first appellant referred to the respondent;

(vi) Zambri believed the truth of the statement, as supported by her conduct (Q: Apakah tujuan anda meminta kad pengenalan daripada plaintif? A: Kerana tindak tanduk kedua-dua suami isteri defendan 1 dan 2 meyakinkan bahawa plaintif adalah disyaki dalam cubaan menculik anak beliau);

(vii) Zambri was never impeached, discredited or established as a witness of untruth. He was accepted by the court as a witness of truth (RR 36);

(viii) there were parents around;

(ix) the senior assistant of the school was also informed by the first appellant that someone wanted to kidnap her child;

(x) excitement and fear were created by the acts of the appellants, which resulted in police reports being lodged by the headmaster and the senior assistant;

(xi) the respondent fell ill, an outcome that was consistent with someone suffering anguish, pain and shame;

(xii) the court had found the respondent as a witness of truth (RR 36); and

(xiii) the respondent had established the slander and losses as alleged in the statement of claim.

[26] The appellant still had elected to submit a 'no case to answer'. The notes of proceedings clearly showed that when the first appellant decided to submit a 'no case to answer' it was done with open eyes. At p 295 of the record of appeal, learned counsel for the first appellant had conceded that the respondent had disclosed a case against her (a typographical error was committed when the notes recorded 'the second defendant' whence earlier the court had recorded that a case had not been made out against the second defendant). The admission by the first appellant that the election to submit no case to answer meant that the court had to accept the truth of the respondent's evidence was just a reiteration of the law. Unless rebutted the respondent's evidence stood unchallenged and unrebutted.

[27] As regards the appellant's election a perusal of the notes of proceedings is necessary, in order to gauge whether the procedures had been faithfully complied, and there was proper appreciation of the law by all concerned. When such an election is made, either a defendant at the close of the plaintiff's case had not made out a case in law, or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been

discharged (*Storey v Storey* [1961] P 63). In relation to this issue the following notation could be found in the notes of proceedings (RR 280):

> Defence: I am making a submission of no case to answer.
>
> Court: I have therefore to put counsel on notice that you will have to stand or fall by the evidence adduced.
>
> Mr Lambert: I understand and I have made the election. Pursuant to O 35 r 4(3) of the RHC the plaintiff will have to submit and I will then reply.
>
> Mr Kalaichelvan: I have been taken by surprise. I need time to prepare my submission...

[28] At RR 287 the respondent in the course of the proceedings had said:

> No case to answer. This has deprived and short changed the plaintiff in not being able to cross-examine the defendants towards extracting the truth and at the same time exposing the first and second defendants' malicious conduct. Court should draw an adverse inference against the defendants. Therefore plaintiff's evidence and his witnesses' testimony stand unchallenged and unrebutted.

[29] By resorting to such an election and unwilling to adduce any evidence, the court had no choice but to be bound by that election and to accept the truth of the evidence adduced in court (*Halsbury's Laws of England* (4th Ed) Vol 37, at p 396; *Simirah v Chua Hock Lee & Anor* [1963] MLJ 239; [1963] 1 LNS 128; *Mohd Nor Afandi Mohamed Junus v Rahman Shah Alang Ibrahim & Anor* [2008] 3 MLJ 81; [2008] 2 CLJ 369. In *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bt Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693; [1997] 4 CLJ 509 the court at p 712 (MLJ); at p 528 (CLJ) had occasion to opine:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[30] Based on the above prognosis, with the evidence adduced by the respondent as true, and after perusing the statement, I found the view of the learned trial judge in regard to the first appellant as correct, as I likewise found the statement made by her as slanderous and hence defamatory. A perusal of the words as repeated by Zambri (PW3) to the respondent, though not verbatim as pleaded in the statement of claim, showed that they have a tendency to excite ordinary listeners that the respondent was out to kidnap the first appellant's child. The relevant portion of Zambri's testimony reads as follows:

> Q: Bolehkah anda mengecam lelaki India dan perempuan yang dimaksudkan oleh anda tersebut?

A: Ya. (Witness identifies both the first and second defendants as the female and male Indians whom he met.) Yang menyatakan 4 orang lelaki akan menculik anaknya ialah perempuan.

Q: Apa yang berlaku seterusnya?

A: Pada masa yang sama perempuan India tersebut menunjukkan ke arah satu lelaki Melayu dengan menyatakan itu adalah abang kepada salah seorang 4 lelaki yang cuba menculik anak beliau dan mengarahkan saya menangkap lelaki tersebut.

Q: Bolehkah anda mengecam orang Melayu yang dimaksudkan oleh defendant pertama tersebut?

A: Ya. (Witness identifies the plaintiff)

[31] To regurgitate the evidence, the slanderous remarks which were made by the first appellant, and repeated to the respondent by Zambri (PW3) conspicuously had referred to the respondent. This satisfied the legal requirement that the slanderous remarks were made to a third party. The conduct of the first appellant pointing towards the direction of the respondent and directing him to arrest the respondent merely strengthened the respondent's case. As regards this gesture of pointing towards the respondent, whether the defamatory imputation was concretised by it, *Gatley on Libel and Slander*, 9th Ed p 67 had authored the following:

> Spoken words and gestures. The same applies to spoken words. But their meaning may also be affected by the tone of voice in which they are spoken or by accompanying expressions or gestures. Signs or gestures may themselves also convey a defamatory imputation, either because they express words (eg deaf and dumb language) or because they have a conventional defamatory meaning known to those who see them, or indicate to the ordinary observer that the plaintiff has done some discreditable act.

[32] The identity of the target of the slanderous remark was never in doubt as seen from the following excerpt:

Q: Oleh kerana ada ramai orang ibu bapa sekitar sekolah macam mana kamu boleh tahu dengan pasti plaintif ialah orang defendan 1 menunjukkan?

A: Memang saya boleh mengenal pasti kerana defendan 1 menunjukkan ke arah yang tepat.

[33] There was no hesitation as to Zambri's target of enquiry when he zeroed in on the respondent, to be followed by the request of his

identification card. He also repeated to the respondent of the slanderous remark made of him when the latter demanded to know the reason for the request.

[34] With the slander pleaded in the statement of claim having been established, what with that statement and all the accompanying evidence taken as true, and it being presumed to be false the onus thus shifted to the appellant. Regretfully with the election of no case to answer the appellant had failed to rebut the respondent's case. Evidentially it was also established that the kidnap attempt was a fabricated story, which eventually led to the first appellant's indictment and conviction and incarcerated for 12 weeks.

[35] With the evidence unrebutted I was satisfied that there was no error in the reasoning of the learned judge, when concluding that the respondent had successfully established a tort of defamation against him by the first appellant on a balance of probability. I shall touch on the issue of damages after having resolved the appeal filed by the second appellant.

[36] As regards the appeal by the second appellant the election of no case to answer was not without justification. A scrutiny of the statement of claim failed to come out with any specific pleaded slanderous words uttered by him or gestures against the respondent. Oblique statements will not do. On that score with no particulars set out there was total failure of compliance with the requirements of O 78 r 3 of the Rules of the High Court 1980.

[37] To exacerbate matters, during the trial not an iota of evidence was adduced by the respondent to establish that the second appellant had said in so many words or even the slightest of gesture, that the respondent was out to kidnap his child. Silence on his part, at the material time when the first appellant made the slanderous remarks, which could be interpreted in any manner, in the circumstances of the case failed to satisfy an important legal prerequisite. His silence, by no stretch of the imagination could be equated with words that qualify as slanderous, or the first appellant's words could be attributed to him. The only time the second appellant spoke out of the kidnapping attempt was when he said to the senior assistant that someone was out to kidnap his child. Yet this remark never referred to the respondent by name. With that failure to establish such an important ingredient, and thus failing to transmit anything slanderous to a third party affecting the respondent, even the election of no case to answer by the second appellant failed to salvage the respondent's case against him. Premised on those reasons I allow the second appellant's appeal. I order no costs here and below against the respondent as there are special circumstances which led to this suit against the second appellant. The whole of the High Court order against the second appellant is set aside and his deposit refunded.

[38] I now return to the issue of damages to be imposed on the first appellant. As a result of this harrowing experience the respondent had suffered mental anguish and became unwell. His family likewise suffered embarrassment. His daughter had a difficult time in school and his relationship with her became strained. After resigning from his job he found difficulty in getting another because of the serious allegation cast at him.

[39] By virtue of the presumption that damage had been caused by the appellants, let alone there was failure to rebut it, the next course of action was for the learned judge to assess the damage. A perusal of the judgement showed that the legal principles alluded to by the learned judge when awarding the damage and compensation was correct except that it was on the higher side of the scale. Even the respondent's counsel had conceded to that error. I therefore allow the appeal by the first appellant but only in respect of the damage. A global sum of RM200,000 for damage, included in it general damages and aggravated damages, a sum in sync with current awards trend, is hereby ordered. Before arriving at this sum I had taken into account the sufferings of the respondent and the want of apology tendered or remorse shown by the first appellant. The orders of the High Court as regards liability and costs are therefore affirmed. Parties are to bear their own costs here. I also order the deposit to be refunded to the first appellant.

Appeals allowed with costs.

Reported by Asghar Ali Ali Mohamed